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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

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EDDIE SHIPP and
GWENDOLYN BRANTLEY SHIPP,
Jointly and Severally,

Petitioners,

-vs-

ELIZABETH BYERLEIN, As
Successor in interest to
her late husband,
ARTHUR BYERLEIN,

Respondent.

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT SHOULD ENTERTAIN A PETITION FOR A WRIT OF CERTIORARI WHICH IS RETURNED TO THE COURT OVER SEVEN MONTHS AFTER BEING REJECTED FOR FAILURE TO FOLLOW THE COURT RULES?

II. WHETHER THE PETITION PRESENTS A FEDERAL QUESTION?

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STEPHEN H. BOAK, Attorney for ELIZABETH BYERLEIN, submits this Brief in Opposition to the Petition for a Writ of Certiorari to Review the Judgment of the Michigan Court of Appeals

## COUNTER-STATEMENT OF FACTS

The Respondent held a valid second mortgage on property located in the City of Detroit, Michigan. The parcel was owned by Theodore and Celestine Graham. The IRS filed federal tax liens against the property because of taxes owed by the Grahams.

The holder of the first mortgage foreclosed but the Grahams redeemed thus moving the Respondent's lien into first position, senior to the IRS liens.

The Respondent, seeking to have her lien paid, filed a foreclosure action in the Circuit Court for the County of Wayne, State of Michigan.

A Judicial Deed was recorded in Respondent's favor on November 27, 1984. The Grahams failed to redeem within the statutory redemption period which placed title in Respondent, as of May 20, 1985.

On June 24, 1985, the IRS gave notice of a public auction for said property, offering for a sale the right, title and interest of Theodore and Celestine Graham. The auction was held on July 22, 1985 despite actual and constructive notice to the IRS that the Grahams had no interest to sell. At the auction the Petitioner purchased whatever interest was to be sold and received a tax deed.

After Respondent's unsuccessful

attempt to judicially evict Petitioners, Respondent filed suit to quiet title on July 6, 1987. On March 25, 1988, Respondent's Motion for Summary Disposition was granted. The Circuit Court declared the tax deed void and recognized the Respondent as fee simple owner.

Petitioners filed a Claim of Appeal in the Michigan Court of Appeals. That Court reversed the trial court and remanded for entry of judgment in favor of Petitioners. Respondent filed for rehearing which was granted. The Court of Appeals affirmed that Petitioners held valid title to the property but determined that Respondent may still have a lien on the property depending on

whether she intended to merge lien with title when Respondent foreclosed.

The Petitioners filed an Application for Leave to Appeal in the Michigan Supreme Court. That Petition was denied on July 31, 1990. The Petitioners then petitioned for a Writ of Certiorari on October 29, 1990. The Petition was returned to Petitioners on November 5, 1990 for their failure to follow Rule 33. On June 19, 1991 the present Petition was filed and received by the Respondent's counsel on June 21, 1991.

## REASONS FOR DENYING THE PETITION

I

The Petitioners orginally filed their Petition on October 29, 1990. The filing was not in compliance with the Court Rules and was returned for correction on November 5, 1990. Over seven (7) months later the Petitioners submitted their Petition.

In the meantime, Respondent had expended attorney fees in reliance of the finality of the Michigan Court of Appeals' decision. To that extent she has been prejudiced by this very late correction of the Petition.

Although the Supreme Court Rules do not set a definite time within which corrections must be made, the time must be reasonable. Seven (7) months later is not a reasonable time. Consequently, the Petition should be denied.

II

No federal question is presented by the Petition. The Michigan Court of Appeals applied the federal statutes appropriately and indeed in the Petitioners' favor. Consequently, Petitioners have been granted title to the real estate in question.

The question addressed by the

Court of Appeals, after determining that Petitioners' had title because the IRS was not given actual notice of the Foreclosure Sale, was whether Respondent's senior lien merged with title at the time of foreclosure or whether it survived.

The Michigan Court of Appeals decided as a matter of state law that the intent of the mortgagee controls and remanded to the trial court for a hearing on Respondent's intent. The Court noted that Petitioners would not be prejudiced by such a finding that the lien survivied since they purchased subject to all prior liens at the public auction.

Petitioners argue that the

Court of Appeals ruling is inconsistent with 26 U.S.C. 7425 in that it nulifies the provision that failure to give notice of the foreclosure sale to the government means the sale is subject to the federal liens. In actuality the Court of Appeals has given full implementation of the statute since it elevated a junior tax lien into title.

Petitioners argue that Respondent's lien has merged with title even though they had notice of the Respondent's interest at the time of the public tax auction. They now seek to take away her property interest without compensation. The Michigan Court of

Appeals properly applied a state law standard. No federal question was presented.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

S/

Stephen H. Boak
Attorney for Respondent

## CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
County of Wayne ) ss.

BARBARA J. BAKER, being first duly sworn, deposes and says that on the 22nd day of July, 1991, she mailed forty (40) copies of BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN, to the Clerk of the United States Supreme Court, Washington, D.C. 20543, by enclosing same in a Federal Express envelope to the Clerk at the aforementioned address by personally handing said envelope to a Federal Express Agent, and also mailing

three (3) copies to Attorney Darwyn P. Fair, 65 Cadillac Square, Suite 3200, Detroit, Michigan, 48226 by First Class Mail, postage prepaid, and depositing in a U.S. Mail Receptacle.

Barbara J. Baker
BARBARA J. BAKER

Subscribed and sworn to before me this 22nd day of July, 1991.

Patricia D. Jackson
PATRICIA D. JACKSON, Notary Public
Wayne County, Michigan
My commission expires: 6-16-92